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SERVICE DATE - JUNE 24, 1999

SURFACE TRANSPORTATION BOARD<sup>1</sup>

DECISION

No. 41533

MAKITA U.S.A., INC.--PETITION FOR DECLARATORY ORDER--  
CERTAIN RATES AND PRACTICES OF STEVE D. THOMPSON TRUCKING, INC.

Decided: June 21, 1999

We find that the collection of undercharges sought in this proceeding would be an unreasonable practice under 49 U.S.C. 10701(a) and section 2(e) of the Negotiated Rates Act of 1993, Pub. L. No. 103-180, 107 Stat. 2044 (NRA) (now codified at 49 U.S.C. 13711). Accordingly, we will not reach the other issues raised in this proceeding.

BACKGROUND

This matter arises out of a court action in the United States District Court for the Western District of Louisiana, Monroe Division, in Billy R. Vining, as Trustee on Behalf of the Bankruptcy Estate of Steve D. Thompson Trucking, Inc. v. Makita U.S.A., Inc., Civil Action No. 3:91-1615. The court proceeding was instituted by Billy R. Vining, as Trustee on behalf of Steve D. Thompson Trucking, Inc. (Thompson or respondent), a former motor common and contract carrier, to collect undercharges from Makita U.S.A., Inc. (Makita or petitioner). Thompson seeks undercharges of \$17,865.38, plus interest, attorney fees, and costs, allegedly due, in addition to amounts previously paid, for services rendered in transporting 457 shipments of electric hand tools, parts for electric hand tools, display stands, and catalogs between September 6, 1986, and April 21, 1988.<sup>2</sup> The shipments were less-than-truckload (LTL) movements transported from petitioner's facility at Houston, TX, to points in Arkansas, Louisiana, Mississippi, and Oklahoma. By order dated

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<sup>1</sup> The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the ICC Termination Act or the Act), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the Act provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the Act. This decision relates to a proceeding pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 13709-13711. Therefore, this decision applies the law in effect prior to the Act, and citations are to the former sections of the statute, unless otherwise indicated.

<sup>2</sup> Thompson originally sought undercharges of \$16,694.42 for 460 shipments. Respondent subsequently modified its claims with respect to 54 of the shipments (canceling 3 of its claims and adjusting 51 other claims), increasing its overall claim for undercharges to \$17,865.38.

September 27, 1994, the court stayed the proceeding and referred issues of rate reasonableness and unreasonable practice to the ICC for determination.

Pursuant to the court order, Makita, on January 20, 1995, filed a petition for declaratory order requesting the ICC to resolve issues of tariff applicability, unreasonable practice, and rate reasonableness. By decision served January 31, 1995, a procedural schedule was established for the submission of evidence on non-rate reasonableness issues. On August 28, 1995, petitioner filed its opening statement. Respondent filed its statement of facts and argument on September 22, 1995, and Makita submitted its rebuttal statement on October 25, 1995.

Petitioner asserts that the originally assessed charges were rated by respondent in accordance with its lawfully filed tariffs; that respondent's attempt to collect freight undercharges constitutes an unreasonable practice under section 2(e) of the NRA; and that the rates Thompson seeks to assess are unreasonably high.

Makita supports its assertions with an affidavit from Michael Bange, president of Champion Transportation Services, Inc., a transportation consultant retained by petitioner who conducted an audit and analysis of the balance due bills and claims of respondent. Mr. Bange's affidavit includes among its attachments a representative sample of 36 balance due bills issued on behalf of respondent that reflect originally issued freight bill data as well as revised balance due amounts (Exhibit A). He states that the percentage discounts and reduced minimum charges assessed by Thompson in its original billings were in conformity with respondent's duly filed tariffs ICC THST 100 and ICC THST 102, which were applicable to the subject shipments. Mr. Bange notes that Items 4530, 4545, and 5050 of ICC THST 102 provide for discounts of 45% or 50% off class rates applicable to LTL outbound shipments and discounts of 30%, 45%, or 50% off class rates applicable to outbound minimum charge shipments (Exhibits D, E, and F). The representative balance due freight bills contained in Exhibit A indicate that Thompson originally provided for discounts of 45% or 50% off the applicable class rates for LTL shipments and 30% or 45% off the applicable rates for minimum weight shipments. Mr. Bange asserts that the original freight bills were paid in full by petitioner and that the originally assessed charges billed by respondent and paid by petitioner were never questioned by Thompson. Mr. Bange also maintains that petitioner tendered the subject shipments to respondent in reliance upon the discounted freight rates that had been offered by respondent.

Respondent contends that the discounted charges initially assessed were not authorized by an applicable filed tariff. Thompson maintains that ICC Tariff THST 102, the tariff principally relied upon by petitioner, is a "trigger tariff"<sup>3</sup> that is not applicable to the subject shipments. Respondent

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<sup>3</sup> A "trigger" or "range" tariff is a tariff that contains a range of percentage discounts. Selection of the applicable discount is triggered by a tariff-required action on the part of the shipper, such as the filing of a letter of participation with the carrier.

also asserts that section 2(e) of the NRA is inapplicable to bankrupt carriers, may not be applied retroactively, and is unconstitutional.<sup>4</sup>

Thompson supports its assertions with a verified statement from Stephen L. Swezey, Senior Transportation Consultant for Carrier Service, Inc. (CSI).<sup>5</sup> Mr. Swezey explains the basis for the issuance of the balance due bills, and also addresses various issues raised by petitioner.<sup>6</sup> Mr.

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<sup>4</sup> The court in the underlying proceeding had previously determined Thompson's arguments concerning the applicability and constitutionality of the NRA to be without merit. Additionally, we point out that six federal circuit courts of appeals and virtually every other federal court that has considered respondent's applicability arguments have determined that the remedies provided in section 2 of the NRA apply to the undercharge claims of bankrupt carriers such as Thompson. See Whitaker v. Power Brake Supply, Inc., 68 F.3d 1304 (11th Cir. 1995) (Power Brake); Jones Truck Lines, Inc. v. Whittier Wood Products, Inc., 57 F.3d 642 (8th Cir. 1995) (Whittier Wood); In the Matter of Lifschultz Fast Freight Corporation, 63 F.3d 621 (7th Cir. 1995); In re Transcon Lines, 58 F.3d 1432 (9th Cir. 1995) cert. denied, 116 S. Ct. 1016 (1996); In re Bulldog Trucking, Inc., 66 F.3d 1390 (4th Cir. 1995); Hargrave v. United Wire Hanger Corp., 73 F.3d 36 (3d Cir. 1996); see also, e.g., Jones Truck Lines, Inc. v. AFCO Steel, Inc., 849 F. Supp. 1296 (E.D. Ark. 1994).

Further, as the courts have also held consistently, section 2(e), by its own terms and as more recently amended by the ICC Termination Act, may be applied retroactively against the undercharge claims of defunct, bankrupt carriers that were pending on the NRA's enactment. See, e.g., Jones Truck Lines, Inc. v. Scott Fetzer Co., 860 F. Supp. 1370, 1375-76 (E.D. Ark. 1994); North Penn Transfer, Inc. v. Stationers Distributing Co., 174 B.R. 263 (N.D. Ill. 1994); Gold v. A.J. Hollander Co. (In re Maislin Indus.), 176 B.R. 436 (Bankr. E.D. Mich. 1995); cf. Jones Truck Lines, Inc. v. Phoenix Products Co., 860 F. Supp. 1360 (W.D. Wisc. 1994).

Lastly, in response to respondent's "takings" challenge, the Eighth Circuit in Whittier Wood and the Eleventh Circuit in Power Brake have concluded that the NRA does not work an unconstitutional taking under the Fifth Amendment. 57 F.3d at 649-52; 68 F.3d at 1306 n.3. We point out that the courts have consistently rejected that argument, as well as respondent's "separation of powers" argument and its other constitutional challenges to the NRA. See, e.g., Gold v. A.J. Hollander, supra; American Freight System, Inc. v. ICC (In re American Freight System, Inc.), 179 B.R. 952 (Bankr. D. Kan. 1995); Rushton v. Saratoga Forest Products, Inc. (In re Americana Expressways), 177 B.R. 960 (D. Utah 1995), rev'g 172 B.R. 99 (Bankr. D. Utah 1994); Zimmerman v. Filler King Co. (In re KMC Transport), 179 B.R. 226 (Bankr. D. Idaho 1995); Lewis v. Squareshooter Candy Co. (In re Edson Express), 176 B.R. 54 (D. Kan. 1994).

<sup>5</sup> CSI was authorized to provide rate, audit, and collection services on behalf of Thompson by the United State Bankruptcy Court for the Western District of Louisiana, Monroe Division.

<sup>6</sup> Attached as Appendix A to Mr. Swezey's statement is an affidavit of another CSI auditor, Mr. Charles B. Shinn, who discusses how the original bills were re-rated. Mr. Swezey also attaches to his statement ten representative balance due freight bills for LTL and minimum charge shipments (continued...)

Swezey does not dispute that respondent published tariff items that provided for the discounts here at issue; rather, he maintains that these tariff items required written notification by certified mail from Makita to Thompson's traffic manager of petitioner's desire to participate in the specific tariff items. The pertinent tariff provisions requiring notice of participation indicated that the notifying shipper would receive written acknowledgment from Thompson. Mr. Swezey states, "There is no record of any written notification for participation in these [tariff] items from petitioner or any acknowledgment from Thompson to Makita authorizing the discount provision in Thompson's records." (Swezey statement at 6). Mr. Swezey then explained that other discount provisions (principally a 15% discount) apply to certain of Makita's shipments. He maintains, generally, that the adjusted charges Thompson here seeks to assess are appropriate because: (1) no tariff discount provisions were applicable to minimum charge shipments; (2) no tariff discount provision applied to Makita's shipments from Houston to points in Oklahoma; or (3) in addition to Makita's failure to file appropriate notice of its participation in specific tariffs, various other discounts and rates were applied in error.

#### DISCUSSION AND CONCLUSIONS

We dispose of this proceeding under section 2(e) of the NRA. Accordingly, we do not reach the other issues raised.<sup>7</sup>

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<sup>6</sup>(...continued)

(Appendix C). The representative balance due freight bills indicate originally assessed charges to which Thompson applied discounts of 45% or 50% off applicable rates for LTL shipments, 45% off applicable rates for minimum charge shipments, and a minimum charge of \$30.

<sup>7</sup> Thompson argues that the majority of its claimed undercharges have been properly assessed because Makita did not submit a participation letter for the applicable discount set forth in "trigger" Tariff ICC THST 102. Absent notification of participation, Thompson argues, the discount rate is not triggered and the undiscounted class rate is applicable.

In light of section 2(e), however, whether Makita submitted a participation letter as required by the Thompson trigger tariff is not a determining factor. Section 2(e)'s availability is not limited to situations where the originally billed rate was unfiled; nor is its use precluded when a condition precedent for an otherwise applicable filed tariff has not been satisfied. Rather, in evaluating whether a carrier's collection efforts would be an "unreasonable practice" under section 2(e), the Board must consider, inter alia, whether the shipper was offered a rate by the carrier "other than the rate legally on file with the Board for the transportation service." Section 2(e)(2)(A) (emphasis added). If the carrier and shipper agreed to a price that was embodied in a filed rate that cannot be applied to the involved shipments because of the shipper's alleged failure to file a letter of participation, then the shipper was offered a rate not legally on file "for [that] transportation service." Thus, even if "some of [a carrier's undercharge claims] are based on it billing and collecting an erroneous [filed] rate, if the so-called erroneous rate was negotiated between the

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Section 2(e)(1) of the NRA provides, in pertinent part, that “it shall be an unreasonable practice for a motor carrier of property . . . providing transportation subject to the jurisdiction of the [Board] . . . to attempt to charge or to charge for a transportation service . . . the difference between the applicable rate that [was] lawfully in effect pursuant to a [filed] tariff . . . and the negotiated rate for such transportation service . . . if the carrier . . . is no longer transporting property . . . or is transporting property . . . for the purpose of avoiding application of this subsection.”<sup>8</sup>

It is undisputed that Thompson no longer transports property.<sup>9</sup> Accordingly, we may proceed to determine whether Thompson’s attempt to collect undercharges (the difference between the applicable filed tariff rate and the negotiated rate) is an unreasonable practice.

Initially, we must address the threshold issue of whether sufficient written evidence of a negotiated rate agreement exists to make a section 2(e) determination. Section 2(e)(6)(B) defines the term “negotiated rate” as one agreed on by the shipper and carrier “through negotiations pursuant to which no tariff was lawfully and timely filed . . . and for which there is written evidence of such agreement.” Thus, section 2(e) cannot be satisfied unless there is written evidence of a negotiated rate agreement.

Here, the record contains representative balance due freight bills submitted by both parties that indicate originally assessed class rate charges to which discounts of 45% or 50% off applicable charges for outbound LTL shipments and 30% or 45% off applicable rates for outbound minimum charge shipments were applied.<sup>10</sup> The applied discounts conform to the discounts provided for in Items 4530, 4545, and 5050 of respondent’s published tariffs in ICC THST 102 set forth in Mr. Bange’s Exhibits D, E, and F. We find this evidence sufficient to satisfy the written evidence

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<sup>7</sup>(...continued)

shipper and [carrier] and if the shipper reasonably relied on the rate, the rate would meet the definition of a ‘negotiated rate’ and trigger the application of the provisions of the NRA.” American Freight Systems, Inc. v. ICC, 179 B.R. 952, 957 (Bankr. D. Kan. 1995).

<sup>8</sup> Section 2(e), as originally drafted, applied only to transportation service provided prior to September 30, 1990. Here, we note, the shipments at issue moved before September 30, 1990. In any event, 49 U.S.C. 13711(g), which was enacted in the ICC Termination Act as an exception to the general rule noted in footnote 1 to this decision, deletes the September 30, 1990 cut-off date as to proceedings pending as of January 1, 1996.

<sup>9</sup> The record indicates that Thompson ceased operations as a motor carrier on August 30, 1989.

<sup>10</sup> The discounts applied in the originally issued freight bills are identified in the balance due bills in terms of dollars and cents rather than specific percentages. The dollar and cents figures used fully conform to the percentage discounts referred to in the text.

requirement. E.A. Miller, Inc.-Rates and Practices of Best, 10 I.C.C.2d 235 (1994) (E.A. Miller).<sup>11</sup> See William J. Hunt, Trustee for Ritter Transportation, Inc. v. Gantrade Corp., C.A. No. H-89-2379 (S.D. Tex., March 31, 1997) (finding that written evidence need not include the original freight bills or any other particular type of evidence, as long as the written evidence submitted establishes that specific amounts were paid that were less than the filed rate and that the rates were agreed upon by the parties).

In this case the evidence indicates that the parties conducted business in accordance with agreed-to negotiated discount rates that were originally billed by Thompson and paid for by Makita. The consistent application of rate discounts by respondent in its originally issued freight bills that are in virtual conformity with the discount levels provided for in respondent's published tariffs support petitioner's contentions and reflect the existence of negotiated rates. The evidence further indicates that Makita relied upon the agreed-to discount rates in tendering the subject shipments to Thompson.

In exercising our jurisdiction under section 2(e)(2) we are directed to consider five factors: (1) whether the shipper was offered a transportation rate by the carrier other than the rate legally on

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<sup>11</sup> Thompson, at p.13 of its statement, argues that freight bills do not constitute written evidence. Respondent contends that, under section 2(e)(2)(D) of the NRA, the Board must consider whether the negotiated rate "was billed and collected by the carrier" in making its merits determination as to whether a carrier's conduct was an "unreasonable practice." This section, according to Thompson, contemplates that freight bills reflecting the negotiated rate were issued by the carrier, and the Board must examine the freight bills to determine if section 2(e) has been satisfied. Thompson asserts that allowing freight bills to satisfy the written evidence requirement would make the written evidence provision superfluous because the Board, under section 2(e)(2)(D), must independently consider the collected freight bill.

The ICC and the Board have consistently rejected this argument. Section 2(e)(2)(D) requires the Board to consider "whether the [unfiled] rate was billed and collected by the carrier." There is no requirement under this provision or the NRA's legislative history that the Board use a carrier's freight bills for that determination. A carrier may separately attest, or submit or concede in pleading, that the negotiated, unfiled rate was billed and collected, and there is nothing to preclude the Board from using such statements (or other evidence) in finding that section 2(e)(2)(D) was satisfied.

Even if the Board uses freight bills to satisfy this element, however, it is not inappropriate for it to use those same bills to satisfy the "written evidence" requirement of section 2(e)(6)(B). The carrier's argument might be more persuasive if the "written evidence" requirement were a "sixth" element of a merits determination under section 2(e)(2), but it is not. Rather, as the ICC previously indicated, it is simply a threshold definitional requirement needed to invoke section 2(e). See E.A. Miller, supra, at 239-40. Once that requirement is satisfied by freight bills (or other contemporaneous written evidence), there is nothing to suggest that the same evidence could not be used as part of the Board's separate five-part analysis under section 2(e)(2) to determine whether the carrier's undercharge collection is an unreasonable practice.

file [section 2(e)(2)(A)]; (2) whether the shipper tendered freight to the carrier in reasonable reliance upon the offered rate [section 2(e)(2)(B)]; (3) whether the carrier did not properly or timely file a tariff providing for such rate or failed to enter into an agreement for contract carriage [section 2(e)(2)(C)]; (4) whether the transportation rate was billed and collected by the carrier [section 2(e)(2)(D)]; and (5) whether the carrier or the party representing the carrier now demands additional payment of a higher rate filed in a tariff [section 2(e)(2)(E)].

Here, the evidence establishes that a negotiated rate was offered to Makita by Thompson; that Makita, reasonably relying on the offered rate, tendered the subject traffic to Thompson; that the negotiated rate was billed and collected by Thompson, and that Thompson now seeks to collect additional payment based on a higher rate filed in a tariff. Therefore, under 49 U.S.C. 10701(a) and section 2(e) of the NRA, we find that it is an unreasonable practice for Thompson to attempt to collect undercharges from Makita for transporting the shipments at issue in this proceeding.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is discontinued.
2. This decision is effective on its service date.
3. A copy of this decision will be mailed to:

The Honorable Tucker L. Melancon  
United States District Court for the  
Western District of Louisiana, Monroe Division  
P. O. Drawer 3107  
Monroe, LA 71210

Re: Civil Action No. 3:91-1615

By the Board, Chairman Morgan, Vice Chairman Clyburn and Commissioner Burkes.

Vernon A. Williams  
Secretary